United Mine Workers of America, District 29 *and* Frank Angle *and* Eddie Shrewsberry. Cases 9–CB–7461–1 and 9–CB–7461–2

September 30, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On December 5, 1990, Administrative Law Judge Stephen J. Gross issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified below.

The judge found that the Respondent violated Section 8(b)(1)(A) in September and October 1989. The Respondent excepts, arguing, inter alia, that it had insufficient notice that the conduct the judge found unlawful would be litigated. We reject the Respondent's due-process argument regarding the late October incident and find merit in the Respondent's due-process argument regarding the September incidents for the following reasons.

I. THE FACTS

The Paynter and Leese families own the Employer, a single integrated enterprise with multiple company names.[2] Deron Paynter and Jeff Paynter are officers and managers of the Employer. The Employer's sole source of business is a contract with Maben Energy, whose employees are represented by the United Mine Workers of America (UMWA), Local 5955. Pursuant to that contract, the Employer's 25 drivers haul coal a short distance between the ''coal pile'' at Maben's Stoney no. 5 mine to Maben's East Gulf preparation plant.

The president of the UMWA Local representing Maben's employees complained to Bobby Webb, a member of the Respondent's executive board, about the Employer's use of nonunion drivers. In response, on September 17, 1989, Webb chose Local 1895 President Joseph Carter, and three other union members[3] to accompany Webb, and confronted the Employer's drivers individually as they stopped at the preparation plant scales. Webb asked each driver if he was a UMWA member and gave each a copy of the BCOA[4] and a dues-checkoff authorization. Three of the drivers were told by one of the men accompanying Webb that they had to sign the contract in order to haul into the unionized plant. Another told driver Roger Altizer

> [I]f you don't join, we'll stop you from hauling. Maybe we won't stop you here, and maybe not up at the coal pile. But we can stop you. There's a lot of bushes between here and the coal pile.

A few days later, Webb, Carter, and the same three union members stopped the drivers and discussed the documents Webb had given them. Webb informed the drivers that they would pay a $200 initiation fee and $40 per month in dues. In response to their questions about what they would get in return, Webb answered that the main benefit was ''to be proud to be a member of the United Mineworkers,'' because, as owner-operators, they would not receive other benefits such as health insurance or pensions.

In late October, Webb and Carter, without the three men who had accompanied them in September, traveled to Maben's coal pile no. 5. They took about 150 copies of the BCOA for the 25 drivers to sign (a minimum of 5 copies for each driver), although the drivers had not expressed interest in joining the UMWA. Employer President Jeff Paynter was also present. He told the arriving drivers that they would be discharged that day if they did not join the Union. After Paynter's threat, the employees went to Webb and Carter and signed the proffered documents on behalf of nonexistent companies. The judge found that Webb heard Paynter's threat to discharge employees.[5]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Until the start of the hearing, the companies making up the Employer were named as Respondents in the amended consolidated complaint. At the start of the hearing, the General Counsel moved to sever them from the case, stating that the Regional Director had received a signed settlement agreement from them. The judge granted the General Counsel's motion.

[3] Contrary to the Respondent's contention, the three other men were named in the record. Webb identified them as Clay Mullins, Harless Adkins, and Roger Ryan.

[4] The parties referred to ''the BCOA,'' but did not specifically identify the words represented by the acronym. Webb testified that a coal miner (i.e., a statutory employee) would not sign the BCOA to become a member. Rather an owner-operator of a truck would sign the BCOA ''to join the Union'' and, if the owner-operator had employees, his employees would be covered by the contract. Webb did not explain why he first approached the drivers with the BCOA rather than with individual applications for membership.

[5] Webb testified at trial that Jeff Paynter stood with a group of employees around him ''15, 20, 30 feet or so'' from Webb. Webb also acknowledged that he had stated in his affidavit that Paynter stood between 10 and 15 feet away. Driver Shrewsberry testified that Webb was 2 feet away when Shrewsberry was threatened with discharge. The judge characterized the distance as ''a few feet.'' The

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II. THE JUDGE'S DECISION

As more fully discussed in his decision, the judge found that Webb, Carter, and the three other men that Webb chose to accompany him in his September recruitment of the Employer's drivers were agents of the Respondent. He also found the September ''there's a lot of bushes'' threat, and statements that the drivers had to belong to the UMWA to haul into Maben's facility, violated Section 8(b)(1)(A) in the circumstances of the case. The judge further found that, in late October 1989, the Respondent participated in a scheme with the Employer to coerce employees into joining the UMWA in violation of Section 8(b)(1)(A) of the Act.[6]

III. THE LATE OCTOBER INCIDENT

A. *The Respondent's Exception*

The Respondent excepts to the finding that it violated Section 8(b)(1)(A) ''through acceptance of unlawful aid and assistance from the respondent employers.'' The Respondent acknowledges that the complaint alleged that the Employer unlawfully aided the Respondent but stresses that the complaint did not allege that the Respondent unlawfully accepted the Employer's aid.[7] The Respondent cites *NLRB v. Quality C.A.T.V., Inc.*, 824 F.2d 542 (7th Cir. 1987) (discussed infra), in which the court refused to enforce a Board order, finding that the respondents had insufficient notice of violations found by the Board. The Respondent asserts that it litigated only the complaint's narrow allegation that Webb uttered threats—the only aspect of the complaint directed to the Respondent.

B. *Analysis*

The Board and the courts have long held that the Board is entitled, if not affirmatively obligated, to make findings on fully litigated unfair labor practices.[8] As the Board stated in *Monroe Feed Store*, supra at 1337:

> It is well established that when an issue relating to the subject matter of a complaint is fully litigated at a hearing, the [judge] and the Board are expected to pass upon it even though it is not specifically alleged to be an unfair labor practice in the complaint.

Similarly, the Fourth Circuit stated in *Owens-Corning Fiberglas v. NLRB*, supra at 1361 (quoting *American Boiler Mfrs. Assn. v. NLRB*, supra at 821):

> The ''[c]ourts as well as the National Labor Relations Board have held that a material issue which has been fairly tried by the parties should be decided by the Board regardless of whether it has been specifically pleaded.''

The Fourth Circuit noted that this rule originates in the Board's policy of applying, so far as practicable, the Federal Rules of Civil Procedure, and quoted Rule 15(b) (which remains the same today, Fed.R.Civ.P. 15(b)):

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

Contrary to the Respondent's claim that it defended against only a very narrow complaint allegation of threats uttered by Webb, the record establishes that the Respondent intended to and fully litigated the issue of whether it knowingly accepted the Employer's unlawful assistance.

The Respondent first revealed its intention to litigate the issue of acceptance of unlawful employer aid in its answer to the amended consolidated complaint. The amended consolidated complaint underlying this case was issued against both the Respondent and the Employer, and involved allegations against each that were integrated. The cases against the Employer and the Respondent were consolidated at the complaint stage.[9]

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judge discredited Webb's testimony that he did not hear Paynter's threat to the drivers.

[6] Important to the judge's conclusion that the Respondent participated in a scheme to coerce the employees into joining the UMWA was his finding that, before the drivers signed contracts with Webb, Webb heard Jeff Paynter's threats to fire the drivers unless they joined the Union. The judge further inferred that either (1) Webb and Jeff Paynter agreed to meet at the coal pile for the purpose of coercing the drivers or (2) Paynter told Webb he would be at the coal pile at a specific date and time for the purpose of telling drivers that they had to join the UMWA. We find it unnecessary to adopt the judge's factual inferences; however, because even if it was merely a coincidence that Webb and Paynter were simultaneously at the coal pile, the Respondent violated Sec. 8(b)(1)(A) by knowingly accepting the benefits of Paynter's threats to discharge the drivers if they did not join the Union. We have modified the judge's Order accordingly.

[7] The Respondent notes that the complaint alleged only that Webb: (1) threatened bodily harm to an employee and (2) threatened to cause employees to lose their employment.

[8] *Monroe Feed Store*, 112 NLRB 1336 (1955); *Crown Zellerbach Corp.*, 225 NLRB 911 (1976); *Meilman Food Industries*, 234 NLRB 698 (1978); and *Baytown Sun*, 255 NLRB 154 (1981). *American Boiler Mfrs. Assn. v. NLRB*, 366 F.2d 815, 821 (8th Cir. 1966); *Facet Enterprises v. NLRB*, 907 F.2d 963, 972–975 (10th Cir. 1990). To the same effect: *NLRB v. American Tube Bending*, 205 F.2d 45, 46–47 (2d Cir. 1953) (Judge Learned Hand); *Owens-Corning Fiberglas v. NLRB*, 407 F.2d 1357, 1361 (4th Cir. 1969); and *Alexander's Restaurant & Lounge v. NLRB*, 586 F.2d 1300 (9th Cir. 1978).

[9] The original charge against the Respondent, filed November 2, 1989, alleged that the Respondent had coerced employees in violation of Sec. 8(b)(1)(A) on October 25, 1989, by threatening that it would cause the Employer to terminate the employees if they did not execute the current BCOA agreement and become members of the Union. On October 25, the Employer was charged with violating

Paragraph 10 of the amended consolidated complaint alleged that on or about October 27, 1989, Bobby Webb, in the presence of Jeff Paynter, (1) ''threatened to cause bodily harm to an employee,'' and (2) ''threatened to cause loss of employment to employees . . . who refused to sign dues check-off authorization cards for, and collective bargaining agreements with, Respondent Union.'' The Respondent's answer denied paragraph 10. Paragraph 6 of the complaint alleged that on or about October 27, 1989, the Employer, through Jeff Paynter and Deron Paynter,

> rendered aid, assistance, and support of the Respondent Union by refusing to permit their employees to work unless those employees executed dues check-off authorization cards for, and collective-bargaining agreements with [the UMWA].

Although the allegations concerning the Paynters were directed literally only against the Employer, the Respondent denied them and subsequently stated in its answer that it

> is not aware of any receipt of unlawful assistance and support to itself, and denies that it was aware or knowingly accepted or benefitted from same.[10]

Thus, from early in the litigation the Respondent treated the ''unlawful aid to the union'' as an allegation against itself.

During the hearing, and after severance of the case against the Employer, both the General Counsel and the Respondent continued to treat the question of the Respondent's acceptance of unlawful employer aid as one of the issues being litigated. Thus, the General Counsel elicited testimony regarding the Employer's coercion of the drivers to join the Union within the hearing of the Respondent's agent. The evidence plainly supported the inference that the Respondent knew of and accepted the benefit of the Employer's coercion.

Before the Respondent began its rebuttal case at the hearing, its counsel again indicated that the Respondent was litigating the issue of the receipt of the Employer's unlawful aid. Replying to a question from the judge, the Respondent's counsel stated that the Respondent no longer contested the drivers' statutory employee status, which had previously been in issue. He continued:

> The only paragraph in the complaint that we would still stand upon that deals with the employers is paragraph six which is the one alleging rendering aid and assistance to the Union.

Subsequently, the Respondent's attorney elicited Webb's denial that he had heard Paynter's threats to fire the employees unless they joined the UMWA. Webb's denial was unnecessary to defend against the complaint's allegation that Webb himself threatened drivers. If credited, however, the denial would have constituted a defense to the allegation that the Respondent knowingly accepted the benefit of the Employer's unlawful assistance. The Respondent, after failing to object to the introduction of evidence bearing on the question whether it knowingly accepted the Employer's unlawful assistance, and itself introducing evidence in rebuttal, cannot now be heard to complain that it did not know that its accepting the Employer's unlawful aid was an issue in the case.

Finally, we note that although the Respondent argues that it was prejudiced by the complaint's failure to allege specifically that its acceptance of unlawful employer aid was unlawful, it has not shown that, were the specific allegation in the complaint, it would have litigated this case differently.[11]

Accordingly, we reject the Respondent's due-process argument regarding to the late October violations.

IV. THE SEPTEMBER INCIDENTS

A. *The Respondent's Due-Process Exception*

The Respondent also excepts, inter alia, on due-process grounds to the judge's finding that it violated Section 8(b)(1)(A) in mid-September 1989 when men accompanying Webb threatened to harm one of the drivers, and told others that they had to belong to the Union in order to haul into the unionized preparation plant. As the complaint alleged only that Webb threatened bodily harm and to cause loss of employment in late October 1989, the Respondent contends, and we agree, that it was not on notice that the September incidents were in issue as violations of the Act, nor did it try those issues by consent.

B. *Analysis*

The complaint alleged that the Respondent, acting through Executive Board Member Bobby Webb, unlawfully threatened employees on or about October 27, 1989. The complaint did not allege the violation found: that in September unidentified individuals engaged in

Sec. 8(a)(2) by threatening employees with termination, and, in a separate paragraph, ''by assisting [the Union] in its attempt to organize the employees.''

[10] This paragraph of the Respondent's answer was in response to complaint pars. 12, 13, 14, and 15, which concluded, based on earlier factual allegations, that the Employer had violated Sec. 8(a)(1), (2), (3), and (4).

[11] The fact that the Respondent intended to and did litigate the Respondent's conduct that we now find unlawful distinguishes this case from the case on which it relies, *Quality C.A.T.V.*, supra. There the Seventh Circuit held that the respondent neither litigated nor had notice of the issue on which it was found to have violated the Act.

unlawful threats or that those individuals were agents of either Webb or the Respondent.[12]

Despite the substantial variance between the complaint and the evidence, the General Counsel did not move to amend the complaint or state explicitly on the record that the actions of the unidentified individuals in September 1989 were in issue. In these circumstances, it is not surprising that the Respondent did not cross-examine the General's Counsel's witnesses on this issue. Though, in retrospect, it may appear that the Respondent had an ''opportunity'' to cross-examine the witnesses, we are not persuaded that the Respondent knew that there was any reason to cross-examine the witnesses. It well may be that the Respondent simply did not know, or have reason to know, that the General Counsel would seek, or that the judge would make, a finding of a violation of the Act based on the testimony of these witnesses. In *NLRB v. Quality C.A.T.V., Inc.*, 824 F.2d 542, 547 (7th Cir. 1987), the court examined whether due-process concerns precluded the Board from finding a violation regarding an unalleged unfair labor practice. The court, in reviewing whether a party had fair notice of the allegations against it, stated, inter alia, that:

> But the simple presentation of evidence important to an alternative claim does not satisfy the requirement that any claim at variance from the complaint be ''fully and fairly litigated'' in order for the Board to decide the issue without transgressing [the respondent's] due process rights.

We view this case with respect to the September incidents as one in which relevant evidence was presented relating to a possible violation of the Act. Unfortunately, it is also a case in which there was no notice to the Respondent that the General Counsel sought an unfair labor practice finding in respect to the September incident because it was not alleged in the complaint—nor was the complaint amended to include such a claim. The Respondent could well believe that the General Counsel adduced the evidence regarding the September incidents as background to the October incident.[13] As the Respondent did not have fair notice regarding any claimed September unfair labor practice, the matter was not fully and fairly litigated and we shall accordingly make no finding.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, United Mine Workers of America, District 29, Beckley, West Virginia, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Delete paragraphs 1(a) and 1(b) and reletter subsequent paragraphs.

2. Substitute the following for paragraph 1(c).

''(c) Knowingly accepting unlawful aid and assistance from Dogwood Trucking, Inc., C & T Trucking Company, Sarn Enterprise, Inc., or Little T in recruiting their employees to join the UMWA.''

3. Substitute the attached notice for that of the administrative law judge.

MEMBER RAUDABAUGH, concurring and dissenting in part.

I agree with my colleagues' finding that the Respondent's conduct in October 1989 violated Section 8(b)(1)(A) of the Act. I disagree, however, with their conclusions that the Respondent did not have fair notice regarding the alleged unfair labor practices on September 17 and that these matters were not fully and fairly litigated.

The judge found that Webb (a member of the Respondent's executive board) and the four men he selected to accompany him were all acting as agents of the Respondent. He further found that threats uttered by one or more of these agents, on September 17, were unlawful under Section 8(b)(1)(A).

The General Counsel elicited testimony that clearly encompassed the September 17 threats by the men accompanying Webb. For example, General Counsel witness Compton testified that in the September 17 incident he was confronted at the preparation plant scalehouse by Webb and four other men he did not know. According to Compton, one of them said, ''you

[12] The Respondent, on brief, does not focus on the variance between the dates set forth in the complaint (i.e., October) and the dates of the threats (i.e., September). Nonetheless, the Respondent notes the specificity of the complaint in regard to ''agency, time, and situation.'' We thus consider it proper—in weighing whether the Respondent had fair notice of the allegations against it—to take account of the discrepancy in the dates.

[13] Unlike its actions at trial regarding the October incident, the Respondent did not acknowledge, or proceed in a manner that demonstrated, that it was aware that the September incidents were in issue. We cannot conclude that the Respondent's questioning of Webb about the September incidents establishes that the Respondent intended to, and did in fact, litigate the September incidents. The Respondent may have sought to present—as background to the October incident—its version of the September incidents. Indeed, the Respondent questioned Webb only about his (i.e., Webb's) statements and actions during the September incidents—not about the alleged conduct of those accompanying him. Thus, contrary to our dissenting colleague, the Respondent's examination of Webb suggests that the Respondent was not on notice that the conduct of anyone other than Webb was in issue. The Respondent might well have taken additional action—including cross-examination of the General Counsel's witnesses—had it known that the General Counsel was seeking and the judge would make an unfair labor practice finding regarding the conduct of those accompanying Webb during the September incidents. Cf. *Pottsville Bleaching Co.*, 303 NLRB 186 (1991). The Board there found an unlawful threat that differed to some extent from that alleged in the complaint. The Board found no due-process violation, however, because the complaint accurately alleged an unlawful threat by a supervisor during a given time period and the respondent cross-examined the General Counsel's witness and called its own witness regarding the threat.

have to sign these contracts or you're not going to be able to haul coal into this plant.'' Although Compton stated that Webb introduced himself, he could not identify who in the group had made this statement. On cross-examination, Compton explained that:

> it all started when the Union came down to the scales and they told us that we wouldn't haul in there . . . . The Union told us first if we didn't join the Union, then we would not haul into that prep plant.

General Counsel witness Altizer, a driver, testified that two threats were made to him during the September 17 incident. He testified that he was approached by four men, one of whom identified himself as the president of the Local,[1] and another as the ''district manager or district something.''[2] Then, one of the men asked Altizer if he belonged to the Union, and said:

> if I hauled coal there I had to sign a contract . . . if you're going to haul coal here you will belong to this Union. You will sign a contract. He said, I'm bringing contracts up here the next time I come. I believe he told me he had done handed all he had out to other drivers. He said I will bring one up here and you will sign it.

Altizer also testified that when he walked in front of his truck, one of the men went with him and said:

> We'll stop you from hauling. He said we may not stop you here on Maben Energy property . . . or we may not stop you up at the coal pile, but he said we can stop you. He said there's a lot of bushes between here and the coal pile.

Another General Counsel witness, Williams, testified that on September 17 at the preparation plant, people identifying themselves as ''union representatives,'' said that ''we would have to join the Union . . . [b]ecause it was a Union job and you had to belong to the Union to haul into it.'' Williams averred that he knew none of the individuals identifying themselves as ''union representatives.''

The Respondent did not object to the General Counsel's introduction of this evidence. In addition, during his rebuttal case, the Respondent's attorney elicited Webb's account of what occurred during the September 17 incident.

I reject the Respondent's contention that its failure to cross-examine all the General Counsel's witnesses precludes a finding that the September threats were fully litigated. The Respondent had the opportunity to cross-examine all witnesses whose testimony establishes the violation. The Respondent's failure to do so, particularly when it examined Webb with respect to his September 17 conduct, does not warrant the conclusion that the matter was not fully litigated. *Carpenters Western Pennsylvania District Council (DeRose Industries)*, 256 NLRB 584 fn. 1 (1981), citing *Seaview Manor Home*, 222 NLRB 596 (1976). See also *H. H. Robertson Co.*, 263 NLRB 1344, 1361 (1982).

Contrary to my colleagues, I do not find a denial of due process with respect to the conclusion that the Respondent, acting through Webb and four others, threatened employees on September 17. Although the complaint alleges only conduct in October, the Respondent does not claim a denial of due process by reason of the difference in dates. The Respondent's sole contention is that the complaint focused on Webb and not the four others. However, the Respondent offered no objection with respect to the testimony concerning the conduct of all five men. Notwithstanding this, my colleagues suggest that the Respondent somehow believed that the testimony about the September events was offered only as background evidence. However, as discussed above, that is not Respondent's contention. In addition, Respondent examined Webb with respect to the September 17 incident. It is unreasonable and speculative to suppose that the Respondent would treat the evidence regarding Webb as relevant to a possible violation but would treat the evidence concerning the four others as background, in circumstances where all five are involved in the same incident.

Finally, even if the Respondent is complaining about the difference in dates (between September and October), I note that the events in September and the events in October are closely related. They both concern efforts to coerce employees into joining the Union. In view of this and in view of the fact that both matters were fully litigated, I find no failure to accord due process. See *Baytown Sun*, 255 NLRB 154 fn. 1 (1981).

In sum, I believe that the events of September 17 were fully and fairly litigated.

My colleagues argue that the ''Respondent was not on notice that the conduct of anyone other than Webb was in issue'' with respect to the September incidents. The argument has no merit. As noted above, evidence concerning the conduct of Webb *and the four others* was extensively adduced. Further, there was full and fair litigation of the issue concerning whether the Respondent was responsible for the conduct of the men accompanying Webb. The evidence established that Webb chose the men to accompany and assist him. The testimony also established that the trips to meet the drivers were part of his usual duties as an executive board member of the Respondent. This evidence

[1] One of the four men was president of Local 1895.

[2] As noted above, Webb was on the executive board of the Respondent (District 29).

fully supports the judge's finding that the men accompanying Webb were agents of the Respondent. Moreover, during his cross-examination of Webb, the General Counsel raised the issue of the agency of the men accompanying Webb. The Respondent did not claim surprise or request additional time to prepare its defense. Nor does it now contend that it would have litigated the case differently if the complaint had expressly alleged all of Webb's accomplices as agents. Thus, there can be no valid claim that the conduct and the agency status of all five men were not fairly and fully litigated.

Accordingly, I would affirm the judge.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT knowingly accept unlawful aid and assistance from Dogwood Trucking, Inc., C & T Trucking Company, Sarn Enterprise, Inc., or Little T in recruiting their employees to the UMWA.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL reimburse, with interest, all former and present drivers employed by Dogwood Trucking, Inc., C & T Trucking Company, Sarn Enterprise, Inc., or Little T for all union dues or other moneys unlawfully exacted from them.

UNITED MINE WORKERS OF AMERICA, DISTRICT 29

James E. Horner and *Donald A. Becher, Esqs.*, for the General Counsel.

James McNeeley, Esq., for the Respondent.

Daniel C. McCarthy, Esq. (Baron & Curtis, Inc.), of Greenwood, Indiana, for Sarn Enterprise, Inc., and Dogwood Trucking, Inc.

DECISION

STEPHEN J. GROSS, Administrative Law Judge. In October 1989, at the truck loading area of a coal mine near Rhodell, West Virginia, a group of truckdrivers signed various documents handed to them by an official of District 29 of the UMWA. (All incidents to which this decision refers occurred in 1989 unless otherwise specified.) By signing those documents the drivers agreed, among other things, to join and pay dues to the UMWA. The General Counsel claims that, prior to those signings, agents of District 29 of the UMWA, in violation of Section 8(b)(1)(A) of the National Labor Relations Act (the Act): (1) ''threatened to cause bodily harm'' to one of the drivers if he refused to sign; and (2) threatened to have the drivers fired unless they signed.[1]

Having heard testimony presented by the parties, and having considered their posthearing briefs, my conclusion is that the record shows that District 29 (the Union) did violate Section 8(b)(1)(A).

The Employers

The truckdrivers whom the Union allegedly threatened are employees of several companies owned and run by members of the Paynter family and their in-laws, the Leeses. The companies: Dogwood Trucking Company, C & T Trucking, Sarn Enterprise, and Little T. (the companies). The companies are in the business of trucking coal from the ''coal pile'' at Maben Energy's Stoney No. 5 mines to Maben Energy's East Gulf preparation plant (the prep plant). Maben Energy contracted with Dogwood Trucking Company for that trucking service. Dogwood provides the service via subcontracts with Sarn, C & T, and Little T. Those companies, in turn, rent their trucks from individual members of the Paynter and Leese family.

The companies form a single-integrated enterprise. There is no doubt about that. The Union has admitted that to be so. And the facts adduced at the hearing show it to be so. (For example, all four companies use the same individuals as supervisors.)

The companies, as a single-integrated enterprise, constitute an employer engaged in commerce for purposes of the Act. Again, the Union admits that to be the case,[2] and the record shows it to be so. (In 1989 Dogwood received $31,000 per week from Maben Energy for its trucking services—more than $1.5 million during the course of the year, and then parceled out much of that to Sarn, C & T, and Little T. Maben Energy, in turn, sold and shipped coal valued much in excess of $50,000 from its West Virginia mines to points outside West Virginia.)

The Employee Status of the Truckdrivers

All of the companies' truckdrivers signed agreements with the companies by which the drivers were denominated ''contractors'' and, as such, agreed ''to furnish drivers'' for the companies' trucks. In return, each driver received $10 per load. Looking no further than those agreements, therefore, none of the companies had any truckdriver employees—all of the driving was handled by contractors. And, indeed, the companies did not withhold taxes or social security, unem-

[1] This proceeding had been consolidated with Cases 9–CA–26962–1 and –2, 9–CA–26963–1 and –2, and 9–CA–26964–1 and –2, in which the General Counsel alleged that the drivers' employers violated Secs. 8(a)(1), (2), (3), and (4) of the Act. But when the hearing opened counsel for the General Counsel advised that the employers had agreed to a settlement acceptable to the General Counsel. I thereupon granted the General Counsel's motion to sever those cases from the General Counsel's case against District 29. The procedural background of this proceeding is as follows: Nov. 2—Angle files charge in 9–CB–7461; Nov. 3—Shrewsberry files charge in 9–CB–7461–2; Dec. 27—consolidated complaint issues (in Cases 9–CA–26962–1 and –2, 9–CA–26963–1 and –2, and 9–CA–26964–1 and –2, as well as 9–CB–7461–1 and –2); Feb. 2, 1990—amended consolidated complaint issues.

[2] See Tr. 231.

ployment compensation, or workers' compensation payments from the drivers' pay.

But in fact the drivers were employees of the companies. Again, the Union admitted that to be so,[3] and the facts show it to be so beyond any possible doubt. For example:

> 1. No driver either owned or rented the truck he drove, or any equipment in it. (The trucks and the equipment were owned by the Paynters and the Leeses.)
>
> 2. No driver paid for fuel for the truck he drove or oil or repairs or insurance or truck taxes.
>
> 3. The companies did not permit any driver to hire anyone else to do the driving. He had to do it himself.
>
> 4. The companies set the hours and the days of the week that each driver had to drive. (The hours were typically 3 a.m. to 3 p.m., or vice versa; the days were Monday through Saturday. I.e., a mandatory 72-hour week.) No driver was permitted to drive either more hours or fewer hours.
>
> 5. The work was limited to driving the 5 miles or so from the coal pile at Stoney No. 5 to the prep plant and back. No driver was permitted to undertake different or additional work.
>
> 6. No driver had access to the truck he drove at times other than the driving times specified by the companies. In fact, another driver drove the same truck for the other 12 hours of each workday.
>
> 7. Even though most of the route was over public roads, the drivers were limited to speeds specified by the companies, which speeds were lower than the roads' published speed limits. The companies disciplined any driver who exceeded the speed limits set by the companies.[4]

The Union's Efforts to Sign Up the Drivers

The UMWA represents Maben Energy's employees. Some of those employees were unhappy about having Maben Energy coal transported between one Maben Energy location and another by drivers who were not members of the UMWA. They expressed that unhappiness to the Union. The Union, in turn, embarked on an effort to sign up the drivers.

The September 17 Confrontation

Maben Energy weighs trucks just before they unload at its prep plant. Each driver has to pick up a ticket at the scale house showing his truck's weight. On or about September 17, as each of the companies' drivers got out of his truck to pick up the weight ticket, he was confronted by five men. (The five were all wearing clothing in camouflage patterns. The drivers assumed that to mean that the five were UMWA members who supported the UMWA's selective strike that was then underway. That assumption was accurate.) One of the five was Bobby Webb, a member of the Union's executive board. Webb introduced himself to each driver, asked the driver if he were a member of a UMWA local union, and gave the driver a copy of the BCOA agreement, a dues-checkoff authorization form, and an information sheet about the UMWA.

At least three of the drivers were told by one or more of the five men in camouflage that the drivers would not be permitted to haul Maben Energy coal unless they joined the UMWA. The UMWA men said things like: ''you have to sign these contracts or you're not going to be able to haul coal into this plant''; and ''it's a union job and you have to belong to the union to haul into it.''

In addition, one of the five union members told one of the drivers something on the order of:

> If you don't join, we'll stop you from hauling. Maybe we won't stop you here, and maybe not up at the coal pile. But we can stop you. There's a lot of bushes between here and the coal pile.

But no driver was asked to sign anything then and there. And all the drivers understood that any effort by the UMWA to prevent nonunion drivers from hauling coal would not occur until some time in the future.

A Few Days Later

A few days later Webb and the other four UMWA members again waited for the drivers as they arrived, one at a time, at the prep plant's scale house.

No member of the companies' management had gotten any advance warning of the Union's organizing effort on September 17. But about 6 hours before Webb and his cohorts arrived at the scale house on this second occasion, a Maben Energy official called an owner/officer of Dogwood Trucking, Deron Paynter, to say that someone from the UMWA ''would probably be around to sign everyone up.'' The Maben Energy official went on to say that if the companies didn't agree to have the UMWA represent their employees, ''then there might be some problems.'' Paynter responded by claiming that the companies' drivers were all ''separate contractors,'' that ''we didn't have any employees.'' Paynter subsequently went to the scale house where he met Webb and told Webb directly that the companies' drivers were ''contractors,'' not employees.

Paynter played no role in the talks between Webb and the drivers that occurred as the drivers pulled up to the scale house. Those talks with the drivers, in turn, were uneventful. By and large the discussions centered around questions by the drivers about the costs of membership and whether they would receive any benefits from union membership. Webb told the drivers that the costs would be an initiation fee of $200 and monthly dues of about $40. Benefits, according to Webb, would be limited to having the honor of belonging to the UMWA and the opportunity to participate in the affairs of a local UMWA union. There would be no medical insurance, for instance, or pension benefits.

The Drivers Agree to Join the UMWA

Sometime toward the end of October, Webb and another UMWA member, James Carter, drove to the coal pile at Stoney No. 5 in Webb's Ford Bronco. (Carter had been one of the four men assisting Webb at the two organizing sessions at the prep plant in September.) The Bronco was filled with copies of the BCOA agreement, checkoff authorization forms, and various other UMWA forms and information sheets. Webb knew that 25 drivers would be pulling into

[3] Ibid.

[4] See, e.g., *Blackberry Creek Trucking*, 291 NLRB 474 (1988).

Stoney No. 5. He went there fully expecting to sign up all 25.

When Webb and Carter arrived at Stoney No. 5 they stood next to the tailgate of the Bronco, awaiting the drivers. Shortly thereafter Jeff Paynter (an owner and officer of C & T Trucking) arrived. He stationed himself a few feet from Webb. (The record does not inform us how Jeff Paynter came to know that Webb would be setting up shop at Stoney No. 5 and when Webb would be doing so.)

As the companies' drivers arrived at Stoney No. 5, many stopped to talk to Jeff Paynter, whom they considered to be, and in fact was, their supervisor. Paynter told each of the drivers to whom he spoke that if the driver did not join the UMWA, the companies would terminate the driver's employment as of the end of the day. (All of the drivers heard what Paynter had to say—either directly from Paynter, or indirectly, from drivers who had spoken to Paynter.) Most of the drivers responded to that news by turning to Webb and signing whatever forms Webb put in front of them. A couple of drivers hesitated for a while, but they then also signed the UMWA forms.

By the end of the day, 24 of the 25 drivers had signed the forms that Webb handed to them. The lone exception was a driver who already was a member of the UMWA.

The Strike

Many of the drivers, perhaps all of them, were furious about having to join the UMWA. Membership to the drivers meant only the payment of substantial amounts of money to the UMWA with no concomitant benefits. The drivers' anger was directed at the companies, since it was the Paynters who put the drivers in the position of either joining the UMWA or losing their jobs.

The drivers decided to strike. They did so by parking their trucks, first at the prep plant, then at Stoney No. 5. But after a few hours Deron and Jeff Paynter told the drivers that they would be fired unless they went back to work. The drivers went back to work.

Conclusion—The Union's Violations of Section 8(b)(1)(A)

The incidents on September 17. As described more fully above, On September 17, one of five the UMWA members told a driver that ''there's a lot of bushes'' between the loading and unloading points on the driver's route. That was a threat to use violence to prevent the driver from driving the route unless he joined the UMWA. As such it violated Section 8(b)(1)(A). *Nationwide Plastics Co.*, 197 NLRB 996, 1005 (1972). (The Union claims that neither Webb nor any of the union members who accompanied him in his organizing efforts were acting as agents of the Union. I discuss agency matters in the following section of this decision. The Union further claims that there can be no 8(b)(1)(A) violation since the record fails to show that the Union knew that the drivers were employees, rather than independent contractors. I also discuss that contention below.)

I further conclude that statements to individual drivers on September 17 by some of the union members to the effect that the drivers ''had to belong to the union to haul into'' the Maben Energy facility violated Section 8(b)(1)(A). But it seems to me the issue is a close one.

With the exception of the one threat to one driver, the setting was a relatively quiet, nonominous one. No driver was asked to sign anything on September 17. The statements about having to join the Union were worded in a way that seemed to refer to some indefinite time in the future. And as of September 17, at least, the drivers had no reason to conclude that their employer would support the Union in requiring union membership.

But the facility where the drivers loaded their trucks was organized by the UMWA as was the facility where the drivers unloaded. And as the drivers knew, the only business of their employer was to haul between those two locations. Those two factors made any threat by agents of the UMWA to prevent the drivers from hauling ''into this plant'' believable and a matter of vital concern. I accordingly conclude that the statements made to several drivers on September 17, to the effect that they would not be able to haul to or from the Maben Energy facilities unless they joined the UMWA, reasonably tended to coerce and restrain the drivers.

Did the Union violate the Act when its agents signed up the drivers. As of mid-October Webb (the District 29 executive board member) knew that the Union had no benefits to offer the drivers, and he knew that the drivers were upset with the notion of having to pay a sizable initiation fee and monthly dues. Nonetheless he drove to Stoney No. 5 fully expecting to sign up 100 percent of the drivers. The only reasonable inference to make, and I make it, is that Webb knew that the drivers were going to be pressured into joining the UMWA.

At Stoney No. 5 Jeff Paynter, whom Webb knew to be an owner and officer of the companies, stood a few feet away from Webb. Drivers would briefly speak to Paynter, then turn to Webb and sign whatever he put in front of them. The drivers, that is, were not coerced into signing by Webb. They were coerced by Paynter.

Webb testified that he was too busy having the drivers sign union forms to pay any attention to what Paynter was saying. I do not credit that testimony. I find that Webb did hear Paynter tell some of the drivers that they could continue their employment only if they joined the UMWA. I also find that even when Webb did not overhear what Paynter was saying, Webb knew what Paynter was telling the drivers.

The question is, does that make out a violation of the Act by the Union. I conclude that it does. The circumstances, added together, show that either (1) Webb and Jeff Paynter had agreed that Paynter was going to join Webb at Stoney No. 5 for the purpose of coercing the drivers into joining the UMWA, or (2) while there was no explicit agreement about the matter, Paynter had told Webb that Paynter would be at Stoney No. 5 at a specified date and time for the purpose of telling drivers that they had to join the UMWA. Either way, and because Webb overheard Paynter threaten the drivers, the Union participated in a scheme by which drivers were unlawfully coerced into joining the UMWA. That adds up to a violation of Section 8(b)(1)(A): *Safeway Stores*, 276 NLRB 944 (1985); *Brown Transport Corp.*, 239 NLRB 711 (1978).

I recognize that the complaint does not specify this theory of violative conduct by the Union. Rather, the complaint alleges only that Webb, ''in the presence of Jeffrey Paynter. . . . [t]hreatened to cause loss of employment to employees'' of the companies. And I have found that Webb

did not utter any threats to the drivers. But the relationship between Webb and Paynter at Stoney No. 5 was raised at the hearing. Moreover the Union knew very well that the General Counsel believed there to be an unlawful relationship between the Union and the companies. In fact, until I granted the General Counsel's motion to sever (at the beginning of the hearing), the complaint alleged that the companies—

> have rendered aid, assistance, and support of Respondent Union by refusing to permit their employees to work unless those employees executed checkoff authorization cards for, and collective-bargaining agreements with, Respondent Union.

I thus conclude that the issue was sufficiently litigated to permit the conclusion that, by Webb's conduct at Stoney No. 5, the Union violated Section 8(b)(1)(A) of the Act.

Agency Issues

The Union contends that neither Webb nor any of the UMWA members who assisted him in seeking to sign up the drivers were agents of the Union and that, therefore, the Union may not be held responsible for their acts.

Webb as an agent. The Union's contention regarding Webb is altogether frivolous.

Webb is a member of the Union's executive board. He advised the drivers of his position with the Union. Webb's duties as an executive board member include checking trucks at locations within District 29's jurisdiction to determine if the drivers are members of the UMWA. It was those duties that led him to speak to the companies' drivers at the prep plant and at Stoney No. 5. All that adds up to the Union obviously being responsible for Webb's statements to the drivers and his actions in presenting checkoff authorization forms and other UMWA documents to the drivers. (Indeed, given Webb's position with the Union, the Union would be responsible for those statements and actions even had the recruiting of drivers into the UMWA not been part of Webb's duties. See *Mine Workers Local 1058 (Beth Energy)*, 299 NLRB 389 (1990).)

Webb's assistants as agents of the Union. Webb denied making any threats to the drivers in the course of the confrontations at the prep plant in September. I credit that denial. He claims that at those confrontations only he and Carter said anything to the drivers—that the other three men with him did not. I do not credit Webb's testimony in that regard. Rather, as discussed above, I find that one or more of the four men accompanying Webb did threaten the drivers. I further find that they did so within sight of Webb, although not necessarily within Webb's earshot. That raises the question of whether Carter and the other three were acting as agents of the Union when one or more of them threatened the drivers.

Carter and the other three men who went with Webb to the prep plant were receiving strike pay from the UMWA. (They were not on strike against either Maben Energy or the companies.) None of the four were officers of District 29. All four accompanied Webb because he asked them to assist him. And what Webb wanted them to assist him in was attaining the Union's object of having the drivers become dues-paying UMWA members.

None of Webb's four assistants was a Maben Energy employee. And there has been no showing that the drivers, upon joining the UMWA, became members of any UMWA local union of which any of the four was a member. Thus the four had no reason whatever to be at the prep plant except to assist Webb.

In sum, an officer of the Union assigned roles to the four in ''the general area'' of recruiting the companies' drivers into the UMWA. *Bio-Medical Applications*, 269 NLRB 827, 828 (1984). One or more of the four threatened drivers with physical violence and loss of employment if the drivers did not join the UMWA. I will assume for present purposes that Webb did not want any of the four to utter any threats. But under Section 2(13) of the Act—

> in determining whether any person is acting as an ''agent'' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

The threats were uttered for the purpose of getting the drivers to join the UMWA; that is, they were ''within the general scope of authority attributed to the agent.'' *Bio-Medical Applications*, above. Moreover, since Webb introduced himself to the drivers as an officer of the Union, and since the four were obviously accompanying Webb, the drivers could ''reasonably have believed'' that each of the four ''was acting on behalf of the Union.'' *Penn Yan Express*, 274 NLRB 449 (1985).

My conclusion that Webb's four assistants Webb were agents of the Union raises a troubling due process issue. The complaint alleges that Webb made all the threats. The complaint also contends only that Webb and Carter were agents of the Union. The complaint says nothing about the other three men who were with Webb at the prep plant. Yet it may have been only those three who uttered any threats.

At the hearing the Union focused its efforts on proving that neither Webb nor Carter did anything wrong. The Union did not call as witnesses any of Webb's other three assistants. (Carter did testify. But for reasons explained in the record, I struck all of his testimony.) Should the Union have foreseen that it might be held responsible for the statements of Webb's assistants?

I think so. Neither the testimony of the General Counsel's witnesses concerning the prep plant incidents, nor that of Webb's, was limited to what Webb, or Webb and Carter, uttered. Moreover the threats against the drivers were made in Webb's presence by persons he had personally asked to accompany him. In these circumstances I conclude that the Union had a full and fair opportunity to litigate the question of whether persons other than Webb threatened the drivers at the prep plant, and whether the Union could properly be held responsible for those threats.

I accordingly further conclude that the Union is responsible for the threats uttered by one or more of Webb's four assistants.

The Union's Alleged Belief that the Drivers were Independent Contractors, not Employees

The Union argues that it could not have violated Section 8(b)(1)(A) in its actions toward the drivers since it believed,

in good faith, that the drivers were independent contractors, not employees. It is not a persuasive argument.

To begin with, the Union failed to prove that it in fact believed that the drivers were independent contractors. It is true that an officer of the companies told Webb that the drivers were independent contractors. But Webb seemed to me to be a savvy, experienced, union organizer who had to have known that the companies might have reasons for falsely claiming that the drivers were not employees. Yet no one from the Union made any inquiry into the facts of the relationship between the drivers and the companies. Had the Union asked any questions at all about that relationship, of course, it would have been clear that the drivers were employees, not independent contractors.

Secondly, the Union's contention raises a kind of dirty-hands issue. That's because if the drivers were not employees, the Union's threats would present issues under Section 8(b)(4).

Thirdly, and most importantly, even were I to find (which I do not) that the Union believed that the drivers were independent contractors rather than employees, that finding would be beside the point. ''[S]cienter is not an element of'' an 8(b)(1)(A) violation. *Desco Vitro-Glaze of Schenectady*, 230 NLRB 379, 385 (1977), enfd. mem. 99 LRRM 3072 (2d Cir. 1978).

REMEDY

The record shows that the drivers joined the UMWA only because they were coerced into doing so by their employer, with the Union knowingly accepting the benefits to it of that coercion.

The record also shows that upon joining the Union, the drivers were required to pay monthly dues. (As it turns out, the drivers were not required to pay any initiation fee.) If the companies were Respondents herein, I would recommend that the companies and the Union be required to jointly and severally reimburse the drivers for all dues they paid to the Union. See, e.g., *Safeway Stores*, 276 NLRB 944 (1985). But the companies are not Respondents, the case against them having been severed from the case against the Union because of a settlement agreement reached between the General Counsel and the companies (as noted in fn. 1, above). Moreover the record does not indicate whether, as a result of that settlement, the companies have reimbursed the drivers partially or wholely for the union dues the drivers were coerced into paying.

Under these circumstances I recommend that, in respect to those present and former drivers employed by the companies from whom union dues were unlawfully exacted, the Union be required to reimburse such drivers for such dues, together with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987); provided that the amounts the Union is required to pay to the drivers should be reduced by whatever payments have been made to the drivers in that respect by the companies. I recommend leaving to the compliance stage determinations about: (1) whether the companies have made such payments and, if they have, the amounts; and (2) the identities of the drivers entitled to be reimbursed by the Union.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, United Mine Workers of America, District 29, Beckley, West Virginia, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening employees of Dogwood Trucking, Inc., C & T Trucking Company, Sarn Enterprise, Inc., or Little T with physical harm if they do not become members of the UMWA.

(b) Threatening employees of Dogwood Trucking, Inc., C & T Trucking Company, Sarn Enterprise, Inc., or Little T with loss of employment if they do not become members of the UMWA.

(c) Participating in a scheme by which such employers coerce employees into becoming members of the UMWA.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reimburse former and present drivers employed by Dogwood Trucking, Inc., C & T Trucking Company, Sarn Enterprise, Inc., or Little T for all dues unlawfully exacted from them by or on behalf of the Union, in the manner provided in the remedy section of this decision.

(b) Post in its offices copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Union's representative, shall be posted by the Union immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Union to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and mail sufficient copies of the notices to the Regional Director for posting by Dogwood Trucking, Inc., C & T Trucking Company, Sarn Enterprise, Inc., and Little T, if willing, at all places where notices to employees are customarily posted.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Union has taken to comply.

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[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''